NO. 15083

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

MERVIN MOUNCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT

Appeal from the United States District Court for the Eastern District of Washington Northern Division

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QUESTIONS PRESENTED

First: Do photographs of persons in the nude, printed in nudist periodicals, used solely to illustrate clean printed matter therein advocating nudism, make the periodicals obscene?

Second: If so, did Congress in enacting 19 U. S. C. 1305 (a) intend to include only those matters "dangerous to the nation?"

Third: If Congress did so intend, has Congress authority to legislate as to matters involving morals only, or is such legislation in conflict with the First, Fifth, Ninth and Tenth Amendments?

Fourth: Does the Act sufficiently standardize the word "obscene" to permit uniform construction and enforcement?

Fifth: Does the Act deny freedom of speech to the advocates of nudism?

STATUTES INVOLVED

19 U. S. C. 1305 (a)

All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. . . . Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; . . . Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. . . In any such proceeding any party in interest . . . may have an appeal or the right of review as in the case of ordinary actions or suits.

28 U. S. C. 1291—Final Decisions of District Courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U. S. C. 1294—Circuits in which Decisions Reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

28 U. S. C. 1331—Federal Question; Amount in Controversy

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930.

JURISDICTIONAL STATEMENT

On May 3, 1955, UNITED STATES Customs Officials seized two shipments of nudist periodicals consigned to appellant at Spokane, Washington. The seizure was reported to the District Attorney for the Eastern District of Washington, who filed the libel of information herein. Jurisdiction below arises if at all, under 19 U. S. C. 1305 (a); 28 U. S. C. 1331.

District Court, after trial, found 23 of the 27 periodicals obscene and ordered their destruction. Upon motion timely made, the District Court, on January 19, 1956, denied appellant's Motion to Amend the Findings of Fact, Conclusions of Law and Judgment. Notice of appeal from the judgment and from the Order denying appellant's motion to so amend, together with cash bond of $250.00 was duly served and filed on February 15, 1956.

Jurisdiction of this court arises under 28 U. S. C. 1291 and 1294 (1), as well as 19 U. S. C. 1305 (a).

STATEMENT OF THE CASE

(All Italics Ours)

The facts are undisputed.

Mervin Mounce, herein called appellant, is a charter member of Sunway, a non-profit nudist association, incorporated under the laws of the state of Washington. He is an ex-President of American Sun Bathing Association, the national nudist organization. The association publishes the magazines SUN and SUNSHINE AND HEALTH with nudist photographs therein, in this country to promote their beliefs and ideals. Appellant also imports similar magazines printed in Norway, Sweden, Switzerland, Germany, France, etc., to advance the nudist teachings and beliefs, such imported periodicals being very similar to those published and circulated in the United States. (R. 46, 48). (Compare plaintiff's ex. 1 to 27 with Defendant's ex. 28 to 33).

Some of the periodicals are imported for distribution among the members of the nudist associations and others placed with news dealers with instructions to sell the same only to nudists or potential nudists. (R. 55).

May 3, 1955, two shipments of these periodicals, consigned to appellant, were seized by the customs officials,

and the District Attorney for the Eastern District of Washington filed a libel action for confiscation and destruction of the same as being *obscene* within the purview of Section 1305 (a) of 19 U. S. C.

At the trial, copies of the periodicals were introduced in evidence. (Exhibits 1 to 27). Three witnesses for the Government, not members of any nudist organization examined some of the photographs in the magazines and testified that in their opinion the same were obscene. (R. 112, 126, 169).

Three witnesses for appellant, all members of Sunway testified they were acquainted with the periodicals and that they were not obscene. (R. 52, 100, 118).

Appellant testified the periodicals were being imported solely to promote the nudist movement, 70% of their converts coming from studying the periodicals; that the photographs therein were used only to illustrate the printed data, and illustrate the wholesomeness and health of the human body and the benefits of nudism. He testified the periodicals were not imported for profit although a small profit might be involved; that the nudist people were sincere in their beliefs that nudism is healthful, wholesome, and, contrary to popular opinion, is a sex deterrent; (R. 54, 55, 59) that the juvenile delinquency record for children of nudists is far below the average of the country. (R. 47, 48). A

memorandum decision was rendered by the court. (R. 18 to 24).

At the hearing to correct record errors (R. 136 to 171), six business men and officials of Spokane, Washington, testified that they were not members of, or in any way connected with, any nudist organization and in their opinion the periodicals were not obscene, while one witness testified for the Government that they were. (R. 137 to 171).

The memorandum opinion was not changed and after Findings and Judgment were entered, appellant moved to modify the same which was by the court denied (R. 178). The court found that Exhibits 2, 3, 4 and 16 were not obscene. (R. 26, 27).

It is admitted, and the court found, that the printed contents of all the exhibits are clean and have no indecent, filthy or obscene statements or language calculated to induce lust. (R. 27). The Government's case is predicated solely upon the photographic illustrations which appear throughout the periodicals.

The trial court said:

> "Nudity is not per se obscene . . . a publication is not to be judged by one or two isolated illustrations or passages but is to be regarded as a whole . . . the trier of facts must draw the line as best he can between art and pornography . . . the libeled books, with one exception are nudist publications

> designed to portray nudist practices and to secure new converts to the movement. Adherents to the cult conscientiously do not regard as objectionable the full display in mixed company of nude male and female bodies. But nudism . . . is in the minority and cannot be said to represent the common viewpoint in this country . . . the character of the printed text in the publications is uniformly unobjectionable . . . so it is really a question of point of view, and if the nudists ever get the majority, why, then, of course, their custom and point of view will prevail." (R. 20, 21, 22, 173).

While the court *concluded* that the periodicals were obscene, *it made no* such finding but found only "that such *pictures are obscene to the average adult* person." (R. 28).

SPECIFICATIONS OF ERROR

I.

There is no substantial evidence and no "finding" to support the Judgment that the periodicals are obscene.

II.

The judgment is in conflict with the evidence.

III.

The court erred in finding that photographs, illustrating clean printed material are obscene.

IV.

Congress intended the Act to apply only to those restraints "needed for the safety of the nation" (not needed here).

V.

If Congress intended otherwise, the Act is unconstitutional because:

(a) No authority is delegated to Congress to regulate morals or the amount of clothing to be used in photographs, used for illustrations in periodicals.

(b) The Act is prohibited by Amendment I of the Constitution in abridging freedom of speech as to honest beliefs regarding nudism.

(c) The Act invades rights reserved to the States, namely, to regulate the morals of its people, and is contrary to the Ninth and Tenth Amendments.

(d) The Act is not sufficiently certain to permit uniform construction and enforcement.

(e) The Act deprives appellant of his liberty and property without due or uniform process, contrary to the Fifth Amendment.

VI.

As construed by the trial court, the Act is discriminatory between beliefs and teachings as to health and morals.

SUMMARY OF ARGUMENT

All the printed context of the periodicals advocating the benefits of nudism are admittedly clean and proper and is so found in the memorandum opinion. Appellant contends that photographs of persons in the nude, printed in such periodicals solely to illustrate the clean context, do not make the periodicals obscene under the rule stated by the United States Supreme Court.

On its face, 19 U. S. C. 1305 (a) *purports* to include any periodical which a judge or a jury dislikes or would not have in their homes. The District Attorney frequently asked the question: "Would you permit this periodical in your home?" The trial court held some of the issues of PARADIES obscene and others not.

Clearly if this Act was intended by Congress to regulate the morals of the people through the courts, it is unconstitutional as not within the grant of authority to Congress and is also within the rights reserved to the States.

Furthermore, the word "obscene" is so impossible to standardize that uniform construction and enforcement would be impossible—one court or one jury would construe the periodicals as obscene while another would construe them otherwise. As stated by Mr. Justice Frankfurter:

"It leaves wide open the question as to what person, doctrine or things are sacred" (obscene, in this case).

However, in order not to hold the Act unconstitutional and therefore void, we believe Congress intended, and this court should hold, that the Act was intended by Congress to include only those matters "dangerous to the nation" because the Act begins by covering "treason," "insurrection against the United States," "forcible resistance to any law of the United States," etc.

By construing the Congressional intent to involve only matters regarding "the safety of the nation," both the constitutional questions and a uniform definition of the word "obscene" become unnecessary.

ARGUMENT

I. THERE IS NO SUBSTANTIAL EVIDENCE AND NO "FINDING" TO SUPPORT THE JUDGMENT THAT THE PERIODICALS ARE OBSCENE.

II. THE JUDGMENT IS IN CONFLICT WITH THE EVIDENCE.

III. THE COURT ERRED IN FINDING THAT PHOTOGRAPHS, ILLUSTRATING CLEAN PRINTED MATERIAL ARE OBSCENE.

Keep in mind, there is no finding that the periodicals are obscene—merely the photographs. PHOTOGRAPHIC ILLUSTRATIONS OF CLEAN PRINTED MATERIAL IN A NUDIST PERIODICAL DO NOT MAKE A PERIODICAL OBSCENE.

The definition of the word "obscene" has been before the courts many times, and they hold unanimously:

1. That nudity per se is not obscene.

2. That publications must be judged as a whole and not by certain parts.

3. Their effect on the salacious is not determinative of their character.

4. If certain parts are obscene, whether obscene for obscene purposes, or merely to illustrate non-obscene treatises.

U. S. v. One Book Entitled Ulysses, 5 Fed. Supp. 182 Affirmed: 72 Fed. (2d) 705.

U. S. v. Levine, 83 Fed. (2d) 156.

Parmelee v. U. S., 72 App. D. C. 203, 113 Fed. (2d) 729.

Walker v. Poppenoe, 149 Fed. (2d) 511.

In the *Parmelee* case, supra, the court, after noting that the test applied in the earlier cases was whether the tendency was to corrupt those whose minds are open to such immoral influences, said:

> "But more recently this standard has been repudiated and for it has been substituted the test that a book must be considered as a whole." (P. 731).

What may be considered obscene by one person, or even by one court, may not be obscene to another. For example, to a large group of respectable people, the present Bikini bathing suit is obscene; the costumes of ballet dancers are obscene.

> Mr. Justice Douglas, writing for the court in a similar case, said:
>
> "Under our system of Government there is an accommodation for the widest variety of tastes

and ideas . . . What seems to one to be trash may have for others fleeting or even enduring values."

Hannegan v. Esquire, 327 U. S. 146, pages 157-158. Accord: *Bleistein v. Donaldson Lithographing Co.* 188 U. S. 239.

Nearly 50 years ago a similar statute was invoked to libel a book entitled SEXUAL DEBILITY. The court held that while the book abounded in vulgar terms and was coarse in expressions, the entire book did not indicate *an attempt to corrupt morals or pander lascivious curiosity* and as a whole *was not obscene.*

Hanson v. United States, 157 Fed. 749.

Later, a book entitled MARRIED LOVE was libeled. The book attempted to explain how the sex life of married couples could be made happier and there were many pictures of which the court did not approve. The court held, however, that the book *had a purpose* regardless of whether one agreed with the views of the author, and dismissed the libel action.

U. S. v. Married Love, 48 F. (2d) 821.

In a later case, in an opinion that analyzes the law very clearly (opinion by Judge Hand) the Court defines the term "obscenity" under Webster and Black's Law Dictionaries and previous court decisions and says:

"Although the book runs counter to the views of many persons, it does not fall within the test of obscenity."

U. S. v. Book Contraception, 51 F. (2d) 525.

In a later case, a book written by James Joyce, a pioneer in Physiology and phychology, discusses frankly all the elements of life. In an opinion by Judge Augustus Hand, the court said:

"It (lays) bare the souls of . . . intellectuals and . . . outcasts . . . with a literalism that leaves nothing unsaid . . . *numerous long passages contain matter that is obscene under any fair definition . . . yet they are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole rather than to promote lust or portray filth for its own* sake . . . if (the erotic passages) . . . are to make the book subject to confiscation, by the same test Venus and Adonis, Hamlet, Romeo and Juliet and the story told in the 8th book of the Odyssey . . . would have to be suppressed . . . works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content . . . nothing in such a field is more stifling to progress than the limitation of the right to experiment with a new techninque . . . (the book Ulysses) does not fall within the statute, although it may justly offend many." (Italics mine).

U. S. v. Book Ulysses, 72 F. (2d) 705. 70d-7-8-9

Getting down to periodicals exactly similar to those we have here, the courts have defined "obscenity" as:

> "Calculated to lower that standard which we regard as essential to civilization or calculated with the ordinary person to deprave his morals or lead to impure purposes."
>
> *Sunshine Book Co. v. Summerfield,* 128 F. Sup. 564 at 567.

The United States Court of Appeals for the District of Columbia, in 1940, spent a vast amount of time and study in a decision, citing almost every previous case that had any bearing upon such matters. The collector of customs had seized six books entitled NUDISM IN MODERN LIFE. The United States District Attorney libeled them. The court said that the illustrations which were claimed to be obscene should have been marked with reference to the written text of the books, but even so, they were illustrative of the thought and language of the author and were *not calculated to deprave,* etc., and were therefore not obscene. We quote:

> "An age accustomed to the elaborate bathing costumes of forty years ago might have considered obscene the present-day beach costume of halters and trunks. But it is also true that the present age might regard those of 1900 as even more obscene.
>
> "It cannot be assumed that nudity is obscene per se . . . from the teachings of psychology and sociology, we know that the contrary view is held by social scientists.
>
> "Nudity in art has long been recognized as the reverse of obscene. Art galleries . . . art cata-

logues . . . ENCYCLOPAEDIA BRITTANNICA, contains nudes, full front view, male and female, and nude males and females pictured together and in physical contact.

"The picturization here challenged has been used in the libeled book to accompany an honest, sincere, scientific and educational study and exposition of a sociological phenomenon and is, in our opinion, clearly permitted by present-day concepts of propriety.

"THE PHOTOGRAPHS USED IN THE BOOK HERE INVOLVED HAVE DEFINITE RELEVANCY TO THE WRITTEN TEXT, EVEN THOUGH THERE ARE NO SPECIFIC REFERENCES THEREIN BY PLATE NUMBER; AND IT CANNOT FAIRLY BE SAID . . . THEY WERE INTRODUCED TO PROMOTE LUST . . . (Caps mine). The illustrations depict better than words . . . the beautiful and healthful methods and activities of a gymnosophic society. They portray them as actually applied in several European countries by many thousands of men, women and children.

"The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's QUEEN MAB was an indictable offense, are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

Parmelee v. United States, 113 Fed. (2d) 729 at p. p. 732, 734, 735, 737, 738.

A number of trial courts have held a motion picture showing nude people to be not obscene.

Sunshine Book Co. v. Summerfield
CA No. 3007 — 53 D. C., July 13, 1953.

LeBaron v. Olesen, 125 F. Supp. 53.

State v. Lerner, 81 N. E. (2d) 282.

The nudist periodical SUNSHINE AND HEALTH has been going through the United States mail regularly for over twenty-three years.

A host of modern authorities cited with approval in the Parmelee case, supra, agree that nudity does not cause sexual delinquency but that it satisfies curiousity of infants and children about the human body; that it is a positive factor towards a sane and wholesome social order.

Havelock Ellis

Professor Howard C. Warren

Dr. Albert Ellis

A mimeographed outline put out by the New Jersey Congress of Parents and Teachers and based on the Family Education Course of Dr. Mabel Grier Lesher contains this at page 3:

"X. Child should have knowledge of body of opposite sex.

1. See bodies of parents, brothers and sisters, in a natural way.

2. If only child, arrange to have youngster see baby of opposite sex being bathed.

3. Learning information as a part of a natural experience avoids undue curiousity causing 'Peeping Toms'.

4. Knowledge of appearance of bodies of both sexes helps child to grasp quickly the explanation of 'mating,' thus relieving parent of undue embarrassment, since many parents find this question difficult to answer."

The growth of nudity in various fields, in painting, in sculpture, and in medical treatises, textbooks and journals was stressed by the Court of Appeals in the Parmelee case, supra.

A collection of da Vinci's drawings was recently published (Leonardo da Vinci on the Human Body, Charles D. O'Malley and J. B. de C. M. Saunders, eds., published by Henry Schuman, New York, 1952) and may be readily and without special permission obtained by any school child at the Library of Congress in Washington and the Public Library in New York City. This volume contains a detailed drawing of the female genitalia (opposite p. 200) and two detailed drawings of cross-sections of a human male and female in the act of intercourse with the penis inserted in the vagina (opposite pp. 204 and 205). Cited in the Parmelee case, supra, footnote at page 734.

Human nudes in painting, sculpture and etching are in various museums throughout the country and

school children by the thousands see them. A number of these nudes, as the court pointed out in the Parmelee case, are reproduced in such a conservative publication as the ENCYCLOPAEDIA BRITTANNICA, which school children consult every day.

To the same effect see:

Gay, on Going Naked, pages 54-56, 163.

F. and M. Merrill, Among the Nudists, pages 135-143, 247.

Nudism Comes to America, pages 299 ff.

Parmelee, The New Gymnosophy, pages 299 ff.

Royer, Let's Go Naked (translation from the French) Pages 192 ff.

Havelock Ellis in his *Studies in the Psychology of Sex,* Vol. 3, *The Evolution of Modesty,* page 39, quoted with approval in the Parmelee case at page 732, says:

> "Nakedness is always chaster in its effects than partial clothing. . . Venus herself, as she drops her garments and steps on the model-throne, leaves behind her on the floor every weapon in her armory by which she can pierce to the grosser passions of men."

Thus, it is not nudity but partial clothing that leads to sexual stimulation. It is the strip tease, as its very name implies, it is the art of a Gypsy Rose Lee, the

plunging neckline of a Faye Emerson, the sarong of a Dorothy Lamour, the sweaters on sweater girls and bikini bathing suits, and not nudism, that lead to sexual excitation.

Judge Frank said in his concurring opinion in

> *Roth v. Goldman,* 172 F. (2d) 788, at P. 792 (CA2) Cert. Den. 337 U. S. 938.
>
> "Psychological studies in the last few decades suggest that all kinds of stimuli—for instance, the odor of lilacs or old leather, the sight of an umbrella or a candle, or the touch of a piece of silk or cheesecloth—may be provocative of irregular sexual behavior. . ."

Finally a case involving similar periodicals should be controlling here.

The nudist periodicals SUNSHINE AND HEALTH and SUN were denied the use of the mails by the Postmaster General as being obscene within the purview of a similar statute. The Postmaster General said "while the written material was not obscene, the pictures in the magazine were obscene." (In effect what the trial court held here).

Respondents asked for injunctive relief in the District Court of the District of Columbia on July 13, 1953. Judge Schweinhaut held that the periodicals as a whole were not obscene. The Postmaster General appealed and on December 16, 1954, the Court of Ap-

peals affirmed the decision, and quoted with approval from the *Parmelee* case, supra. *The appellate court even indicated there might be a question of the constitutionality of the statute involved,* but stated it was not required to pass on that point because the periodicals were not obscene.

> *Summerfield v. Sunshine Book Co.* 221 Fed. (2d) 42.

The Postmaster General applied to the Supreme Court of the United States for a Writ of Certiorari, which on May 9, 1955, was denied.

> *Sunshine Book Co. v. Summerfield,* 349 U. S. 921, 99 L. Ed. 1253, 75 S. Ct. 661.

In evidence here are copies of SUN AND HEALTH and of SUN, (Ex. 30-31), which were held by the CCA D. C. not to be obscene. Comparison with the periodicals here indicate no material difference whatever between the periodicals. All are printed and published for the purpose of promoting the nudist movement and contain pictures of nudes. None are calculated or intended to do anything except advocate the healthfulness and wholesomeness of the entire human body and every part thereof.

Translations of the printed material opposite the pictures that might be most nearly objectionable, were admitted in evidence, and we find not a word of obscenity, filth, dirt or indecency of any kind. The

pictures merely illustrate the wholesomeness of the entire nude human body.

The trial court found that the *photographs* (not the periodicals) placed "emphasis on normally private areas." We respectfully submit that a photograph cannot "emphasize" anything for it *is an exact reproduction of nature.* A painting could emphasize the same, but not a photograph.

Since the evidence shows these periodicals are published solely to promote nudism and since there is not one obscene word in the text and every picture in the periodicals is calculated to illustrate the wholesomeness, healthiness and happiness of nudism, and since nudism is not per se obscene, and the court did not *find* the *periodicals* obscene, we respectfully submit that these periodicals are not within the purview of the Act involved.

IV. CONGRESS INTENDED THE ACT TO APPLY ONLY TO THOSE RESTRAINTS "NEEDED FOR THE SAFETY OF THE NATION" (NOT NEEDED HERE).

We respectfully submit that Congress did not intend to delve into morals as to private individuals. The entire purpose of the Act appears to be to avoid importation of matters dangerous to *the Nation, the Government and its institutions.* For example, The

Act refers to "treason," "insurrection," "threats of life" and "forcible resistance to law" indicating that Congress intended the word "obscene" to apply only to matters pertaining to Government and Government affairs and institutions, and not to moral concepts of individuals, as determined by customs officials nor even by courts. For example, the Act was intended to prohibit: (1) An obscene picture of our President as such (2) An obscene picture of our Army or Navy; (3) An obscene periodical concerning our courts or federal statutes; (4) An obscene book or magazine concerning the United States or our form of government; or (5) An obscene periodical concerning West Point, the Naval Academy, the American Flag, etc.

The Act can be held constitutional if limited to that definition, and where one of two possible constructions will make a law valid, such construction will be adopted by the court.

As pointed out by Justices Holmes and Brandeis, the First Amendment to the Constitution was intended *to prevent restraints* except those "needed for the safety of the nation."

> *Leach v. Carlyle,* 258 U. S. 138, at 141, 42 S. Ct. 227.

If nudism involves the "safety of the nation" so does Religion, education, sex and gambling. Congress

cannot regulate slot machines used only in intrastate transactions, since that involves only a moral end.

> *U. S. v. Denmark,* 346 U. S. 441, 98 L. ed. 179 —74 S. Ct. 190.

In that case in opinions by Justices Jackson and Black, concurring Justices Douglas, Frankfurter, Minton and White, the court said:

> ". . . If sustained (it) would subsequently take into the federal government the entire pursuit of the gambling device . . . a statute that requires the doing of an act in terms so vague that *men of common intelligence* must necessarily guess at its meaning and *differ as to its application,* violates the first essential of due process of law." 98 L. ed. at 188, 189. (Italics mine).

We find not only officials, but District and Circuit Courts disagreeing upon the meaning of "obscene." (Compare decision here with Parmelee).

Congress did not intend that the importation of a periodical on the west coast would be illegal because a court in the west finds it obscene, while permitting importation of the same periodical on the east coast because a court or jury there finds it not obscene. If so, then some court or jury might find a *Religious* book to be obscene, according to its own standards which would clearly deny freedom of speech.

V. IF CONGRESS INTENDED OTHERWISE, THE ACT IS UNCONSTITUTIONAL BECAUSE:

(a) NO AUTHORITY IS DELEGATED TO CONGRESS TO REGULATE MORALS OR THE AMOUNT OF CLOTHING TO BE USED IN PHOTOGRAPHS, USED FOR ILLUSTRATIONS IN PERIODICALS.

(b) THE ACT IS PROHIBITED BY AMENDMENT I OF THE CONSTITUTION IN ABRIDGING FREEDOM OF SPEECH AS TO HONEST BELIEFS REGARDING NUDISM.

(c) THE ACT INVADES RIGHTS RESERVED TO THE STATES, NAMELY, TO REGULATE THE MORALS OF ITS PEOPLE, CONTRARY TO THE NINTH AND TENTH AMENDMENTS.

The only possible authority for this statute is in "regulation of commerce with foreign countries and between the States," or in the "necessarily inferred" provision, as Congress has only those powers expressly granted by the Constitution or necessarily inferred therefrom.

Railroad Retirement Board v. Alton Railway Company, 55 S. Ct. 758, 295 U. S. 330.

It is not a necessary incident to commerce.

Congress has no general police power and even a national emergency does not create such power.

U. S. v. Lieto, 6 Fed. Supp. 32.

Even the XVIII Amendment was necessary, to enable Congress to legislate as to the importation of

intoxicating liquor, (certainly more dangerous than nudism).

The Harrison Anti-narcotic Act was upheld solely because it was WITHIN THE TAXING AUTHORITY of Congress *granted directly* by the constitution. The court indicated that except for the revenue feature, the moral end would have been held unconstitutional.

U. S. v. Doremus, 249 U. S. 86, 63 L. Ed. 493.

And even so, Chief Justice White, and Justices McKenna, Van Devanter, and McReynolds dissented in that case on the ground that the statute was "MERELY AN ATTEMPT BY CONGRESS TO EXERT POWER NOT DELEGATED." (Caps mine).

In the case of

Roth v. Goldman, 172 Fed. (2d) 788.

while there was summary judgment for the Postmaster, Judge Frank, in concurring, said, at page 790:

> ". . . hope that the Supreme Court will review our decision, thus dissipating the fogs that surround this subject . . . for those fogs are indeed thick."

and he quotes from Justices Holmes and Brandeis' dissenting opinion in the *Leach v. Carlyle* case, supra,

and the concurring opinion of Justice Frankfurter in *Hannegan v. Esquire,* 327 U. S. 146, 66 S. Ct. 456, and then concludes:

"I concur in their decision but with bewilderment." P. 798.

In a recent case our court denied Congressional authority over gambling devices:

U. S. v. Three Trade Boosters, 135 Fed. Supp. 24.

(d) THE ACT IS NOT SUFFICIENTLY CERTAIN TO PERMIT UNIFORM CONSTRUCTION AND ENFORCEMENT.

(e) THE ACT DEPRIVES APPELLANT OF HIS LIBERTY AND PROPERTY WITHOUT DUE OR UNIFORM PROCESS, CONTRARY TO THE FIFTH AMENDMENT.

These assignments hinge on the question of whether the Act is sufficiently certain to permit uniform construction and enforcement. If not, it violates the due process clause of the Fifth Amendment.

Recently the U. S. Supreme Court held that the word "sacreligious" was not sufficiently standardized to permit its interpretation by censor officials. Justice Frankfurter wrote a concurring opinion in which he was joined by Justices Jackson and Burton and said:

"But this merely defines by turning an adjective into a noun and bringing in two new words equally undefined. It leaves wide open the question as to what persons, doctrines, or things are sacred."

Burstyn, Inc. v. Wilson, 72 S. Ct. 777, 96 L. ed. 1098, 343 U. S. 495, at 519.

And in an appendix at page 533, of Justice Frankfurter's opinion, much light is thrown upon the impossibility of defining such words as "sacred, blasphemous," etc.

In a later decision in which an appeal from a judgment of the Ohio Court and one from a judgment of the New York Court, involving "obscene" films, were combined on appeal, the court said:

"Per curiam. The judgments are reversed" and cited the *Burstyn* case, supra.

Superior Films v. Department of Education and *Commercial Pictures v. Regents*
346 U. S. 587, 98 L. ed. 329, 74 S. Ct. 286.

Finally, a case that should settle permanently what is the supreme law of this country, was decided October 24, 1955. The Supreme Court of Kansas had unanimously upheld a law banning obscene pictures, and attempted to distinguish the facts in its case from those in the *Burstyn* and *Superior Films* cases, supra. On appeal to the United States Supreme Court, the memorandum decision reads:

"Per Curiam: 'Judgment reversed.' *Burstyn, Inc. v. Wilson,* 72 S. Ct. 777, 96 L. ed. 1098, 343 U. S. 495; *Superior Films v. Department of Education,* 346 U. S. 587, 98 L. ed. 329, 74 S. Ct. 286."

Holmby Productions, Inc. v. Vaughn, et al. 76 S. Ct. 117, 350 U. S. Adv. Reports Nov. 21, 1955, P. 73.

The Act makes it a crime also to import "obscene" matter. Our courts have held that crimes must be defined with appropriate definiteness.

"The vagueness may be in regard to the applicable tests."

"Standing by itself it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order."

Musser v. Utah, 333 U. S. 95 at pages 96, 97.

The real question is, is the vagueness of such a character

"that men of common intelligence must necessarily guess at its meaning. . .

"We think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between allowable and forbidden publications."

Winters v. New York, 333 U. S. 509 at 518-519.

Furthermore the trial court held PARADIES Nos. 40 and 41 (Ex. 3 and 4) were not obscene but that PARADIES Nos. 42, 52 and 53 were.

VI. AS CONSTRUED BY THE TRIAL COURT, THE ACT IS DISCRIMINATORY BETWEEN BELIEFS AND TEACHINGS AS TO HEALTH AND MORALS.

Assuming the Act to be constitutional and intended by Congress to include whatever courts of any part of this country at any given time determine to be obscene, it is an unwarranted delegation of authority. In essence, it would say: "No one shall import anything which courts and juries find to be contrary to the great weight of public opinion." It has no standard by which the nation can be governed and is discriminatory in prohibiting teachings by any certain group whose honest beliefs may differ from those of a certain court. Neither does it have the requisite certainty required by the Due Process clause of the Fifth Amendment, e. g. we have a District Court of D. C. declaring them "not obscene" and the District Court of Washington holding that they are. Constitutions do not change with the varying tides of public opinion and desire.

Administrative control over the right to speak must be based on appropriate standards. The issue here concerns:

"Living law in some of its most delicate aspects. To smother differences of emphasis and nuance will not help its wise development."

Niemotko v. Maryland, 340 U. S. 268 at P. 273. 95 L. Ed. 267.

We respectfully submit that no such authority was ever intended to be given to Congress and no such authority intended by Congress to be granted to the courts, to make varying and variable decisions; that such construction would make the various courts from time to time, the absolute dictators as to beliefs and teachings concerning morals, a matter, we respectfully submit, which is reserved to State and Local authorities under their police power.

We respectfully submit the judgment should be reversed with instructions to dismiss the Libel of Information.

Respectfully submitted,

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